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Administrative Channeling Under the Medicare Act Clarified: *Illinois Council*, Section 405(h), and the Application of Congressional Intent

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INTRODUCTION

In non-legal terms, subject matter jurisdiction is much like your American Express card. You cannot “leave home without it.” This is especially true if you represent a Medicare provider or supplier and intend to sue on a Medicare claim. To be sure, your well-pleaded complaint alleges several bases for the federal district court’s subject matter jurisdiction, including, but not limited to, 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1346 (federal defendant jurisdiction), 28 U.S.C. § 1361 (mandamus), and 5 U.S.C. § 702 (the Administrative Procedures Act). Perhaps, your complaint is brought in the context of an adversary proceeding in bankruptcy, pursuant to 28 U.S.C. § 1334. If, however, the Medicare provider or supplier you represent has not obtained a “final” administrative determination from the Secretary of Health and Human Services, will your jurisdictional allegations survive a motion to dismiss?

To answer this question, the court you have chosen must consider the judicial review provisions of the Medicare Act, codified at 42 U.S.C. § 405(g)¹ and § 405(h)². Those provisions

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*** Any views expressed herein are those of the authors and do not necessarily reflect the official policy or position(s) of the United States Department of Health and Human Services, the Office of the General Counsel, the United States Government, or the law firm of Reinhart, Boerner, Van Deuren, Norris & Rieselbach, s.c.

1. See 42 U.S.C. § 405(g) (1994). The codified version of section 205(g) of the Social Security Act provides, in part:

require the court to determine whether your claim “arises under” the Medicare Act. If so, the Medicare Act requires exhaustion of administrative remedies prior to pursuing those claims in federal court. This requirement is enforced by the Medicare Act’s explicit jurisdictional bar, codified at 42 U.S.C. § 405(h).

On February 29, 2000, the United States Supreme Court revisited one aspect of the judicial review provisions of the Medicare Act—the “arising under” language of 42 U.S.C. § 405(h). The Court set out to determine whether providers of Medicare-reimbursed services could initiate, prior to completing the administrative review process, a federal court challenge to certain nursing home regulations. In *Shalala v. Illinois Council on Long Term Care, Inc.*³ the Court dismissed a nursing home association’s pre-administrative exhaustion judicial review action on jurisdictional grounds.

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

Id.

2. See 42 U.S.C. § 405(h) (1994). The codified version of section 205(h) of the Social Security Act provides, in part:

The findings and decisions of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Id. Although the text of section 405(h) refers to the Commissioner of Social Security, 42 U.S.C. § 1395ii provides that “in applying such provisions with respect to [Medicare], any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.”

3. 120 S. Ct. 1084 (2000), *reh’g denied*, 120 S. Ct. 1738 (2000).

The critical issue in *Illinois Council* was whether challenges to the *methods* by which the Medicare program is administered fall within the scope of the “arising under” language of section 405(h).⁴ In reaching its decision, the Court extended the holdings of its previous decisions in *Weinberger v. Salfi*⁵ and *Heckler v. Ringer*,⁶ which held that section 405(h) bars federal court consideration of both benefit and related non-benefit claims prior to exhausting administrative remedies under section 405(g), where “both the standing and the substantive basis for the presentation” of a claim is either the Social Security or Medicare Act. Following these cases, the Court, in *Illinois Council*, found that section 405(h) applied with equal force to claims other than those for the payment of benefits, thereby barring even a pre-enforcement challenge to certain Medicare regulations. In reaching its conclusion, the Court also distinguished a previous decision, *Bowen v. Michigan Academy of Family Physicians*,⁷ in which the Seventh Circuit modified the Court’s holdings in *Salfi* and *Ringer* by limiting the scope of section 405(h) to “amount determinations.”

While the Supreme Court’s *Illinois Council* decision makes clear that the breadth of the “arising under” language of 42 U.S.C. § 405(h) is exceptionally broad, channeling “most, if not all, Medicare claims”⁸ through the administrative review process as a prerequisite to federal court jurisdiction, there is considerably more to this decision than meets the eye. The broad application of the “arising under” language expands another, widely

4. Section 205(h) of the Social Security Act, codified at 42 U.S.C. § 405(h), is applicable to the Medicare Act “to the same extent” it applies to the Social Security Act. *Illinois Council*, 120 S. Ct. at 1095. Section 405(h) is incorporated *mutatis mutandis*, i.e., “[a]ll necessary changes have been made” into the Medicare Act by 42 U.S.C. § 1395ii, and is, therefore, applicable to claims by both Medicare beneficiaries as well as providers of Medicare-reimbursed services. *Id.* (citing BLACK’S LAW DICTIONARY 1039 (7th ed. 1999)); see also *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 680 (1986). Cf. *Illinois Council*, 120 S. Ct. at 1102 (Stevens, J., dissenting) (“The language in section 1395ii that makes section 405(h) applicable to the Medicare Act ‘to the same extent as’ it applies to the Social Security Act thus encompasses claims by patients, but does not necessarily encompass providers’ challenges to the Secretary’s regulations.”) and *id.* at 1104 (Thomas, J. dissenting). But see *id.* at 1103 (Scalia, J., dissenting) (joining in dissent, but noting “I might have thought, as an original matter, that the categorical language of section 1395ii and section 405(h) overcame even what Justice Thomas acknowledges is the stronger presumption of some judicial review.”).

5. 422 U.S. 749 (1975).

6. 466 U.S. 602 (1984).

7. 476 U.S. 667 (1986).

8. *Illinois Council*, 120 S. Ct. 1084, 1087 (2000).

unrecognized aspect of the jurisdictional bar of section 405(h)—the scope of the congressionally-mandated jurisdictional bar of the Medicare Act. Although the text of section 405(h) seems to extend only to 28 U.S.C. §§ 1331 and 1346, Congress, in fact, set out an exceptionally broad jurisdictional bar for claims arising under the Medicare Act, barring no less than thirty-two separate bases of jurisdiction, including 28 U.S.C. §§ 1332 (diversity) and 1334 (bankruptcy). As a result, the Supreme Court's expansive reading of the "arising under" language of section 405(h) in *Illinois Council* carries with it a broad sweep. Not only does the "arising under" language encompass virtually all Medicare-related legal attacks, the breadth of the jurisdictional bar of section 405(h) means a Medicare provider may now only avoid the administrative exhaustion requirements of the Medicare Act under rare circumstances.

This article begins with a discussion of sections 405(g) and (h) and the Supreme Court cases,⁹ including *Illinois Council*, interpreting the scope of the "arising under" language of section 405(h). Next, it examines the history of section 205(h) of the Social Security Act, now codified as 42 U.S.C. § 405(h), including the most recent amendment to the section contained in the

9. Our primary focus in this article will be the Supreme Court and its opinions interpreting the meaning and scope of sections 405(g) and (h). The effect of section 405(h) on the timing of judicial review has been the subject of much lower court litigation. We shall not catalogue this litigation here, but offer the following citations only as illustrative examples of the lower courts' divergent results. See generally *Ohio Hosp. Ass'n v. Shalala*, 201 F.3d 418 (6th Cir. 1999); *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282 (5th Cir. 1999); *Ancillary Affiliated Health Servs., Inc. v. Shalala*, 165 F.3d 1069 (7th Cir. 1998); *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama, Inc.*, 156 F.3d 1098 (11th Cir. 1998); *Clarinda Home Health v. United States*, 100 F.3d 526 (8th Cir. 1996); *Westchester Management Corp. v. Dep.*, 948 F.2d 279 (6th Cir. 1991) (applying section 405(h) to Medicare cost report disputes brought pursuant to 42 U.S.C. § 1395oo(f)), *cert. denied*, 504 U.S. 909 (1992); *Riley Hosp. & Benevolent Ass'n v. Bowen*, 804 F.2d 302 (5th Cir. 1986) (applying section 405(h) to actions brought pursuant to 42 U.S.C. § 1395oo(f)); *Homewood Prof'l Care Ctr. Ltd. v. Heckler*, 764 F.2d 1242 (7th Cir. 1985); *Geriatrics, Inc. v. Harris*, 640 F.2d 262 (10th Cir. 1981), *cert. denied*, 454 U.S. 832 (1981); *Sunrise Healthcare Corp. v. Shalala*, 50 F. Supp. 2d 830 (S.D. Ill. 1999); *Mediplex of Massachusetts, Inc. v. Shalala*, 39 F. Supp. 2d 88 (D. Mass. 1999); *Dallas Healthcare, Inc. v. Health & Human Servs. Comm'n*, 921 F. Supp. 426 (N.D. Tex. 1996); *Northwest Healthcare, L.P. v. Sullivan*, 793 F. Supp. 724 (W.D. Tex. 1992); *Landmark Med. Ctr. v. Bowen*, 700 F. Supp. 350 (W.D. Tex. 1988); *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070 (D.C. Cir. 1978), *appeal after remand*, *Humana, Inc. v. Heckler*, 758 F.2d 696 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

Deficit Reduction Act of 1984 ("DEFRA").¹⁰ In addition to the amendment itself, DEFRA contains Congress' express instructions as to how the amendment should be construed. These instructions are critical to a correct interpretation and application of section 405(h). It then discusses the relationship between section 205(h) of the Social Security Act, DEFRA, and 42 U.S.C. § 405(h)—a relationship complicated by the fact that Title 42 of the United States Code has not been enacted into positive law. Finally, it analyzes the case law addressing and applying 42 U.S.C. § 405(h) in light of Congress' 1984 amendment(s).

I. CLAIMS "ARISING UNDER" THE MEDICARE ACT AND THE SCOPE OF 42 U.S.C. §§ 405(G) AND (H)

Prior to the initiation of a lawsuit to recover on any claim "arising under" the Medicare Act, the provider must comply with the provisions set forth in 42 U.S.C. §§ 405(g) and (h). These sections do not foreclose judicial review of claims "arising under" the Medicare Act. Rather, they first channel such claims through the agency's administrative apparatus, thereby giving "the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes" without premature judicial interference.¹¹ Two separate, but interrelated sections of the Medicare Act effectuate this channeling process. First, section 405(g) provides for federal district court judicial review of a final decision of the Secretary made after an administrative hearing.¹² Second, section 405(h) specifies that the review provisions of section 405(g) are exclusive:

No findings of fact or decisions of [the Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, [the Secretary], or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.¹³

The Supreme Court has made clear that section 405(h) makes section 405(g) the "sole avenue" for judicial review of a claim

10. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1162.

11. *Illinois Council*, 120 S. Ct. at 1088.

12. See *supra* note 1. The Supreme Court has held section 405(g) has a nonwaivable requirement of presentment of the claim to the Secretary, and a waivable requirement that the administrative remedies prescribed by the Secretary be fully exhausted. See *Heckler v. Ringer*, 466 U.S. 602, 617 (1984).

13. 42 U.S.C. § 405(h) (1994); see *supra* note 2.

"arising under" the Medicare Act.¹⁴ Although the Supreme Court has discussed section 405(h) in a number of cases, three cases are central to the Court's analysis in *Illinois Council: Weinberger v. Salfi*,¹⁵ *Heckler v. Ringer*,¹⁶ and *Bowen v. Michigan Academy of Family Physicians*.¹⁷

A. *The Supreme Court's Decisions In Weinberger v. Salfi and Heckler v. Ringer*

The first major Supreme Court case to analyze the operation of section 405(h) was *Weinberger v. Salfi*.¹⁸ Prior to the *Salfi* decision, the lower courts "rather freely flouted" the jurisdictional limitations prescribed in sections 405(g) and (h), granting relief under several statutes, including 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1491 (Court of Claims jurisdiction), 5 U.S.C. § 702 (the Administrative Procedures Act), and 28 U.S.C. § 1361 (mandamus).¹⁹ However, beginning with the *Salfi* decision, the Supreme Court "attempted to rein in the lower courts" by rejecting general federal question jurisdiction in Social Security cases.²⁰

In *Salfi*, the Supreme Court held the Social Security Act, itself, provided the exclusive administrative and judicial process for challenging any claim "arising under" the Social Security Act.²¹ According to the Court, the existence of the Secretary's "final decision" is a condition of the waiver of sovereign immunity permitting an action against the Secretary. Thus, a "final

14. See *Ringer*, 466 U.S. at 615.

15. 422 U.S. 749 (1975).

16. 466 U.S. 602 (1984).

17. 476 U.S. 667 (1986).

18. 422 U.S. 749 (1975).

19. Timothy Stoltzfus Jost, *Governing Medicare*, 51 ADMIN. L. REV. 39, 47 (1999).

20. *Id.* at 47. In addition to the *Salfi* decision in 1975, the Supreme Court also rejected Court of Claims jurisdiction in a Medicare Part B case, *United States v. Erika Inc.*, 456 U.S. 201 (1982), and rejected independent Administrative Procedure Act jurisdiction in a non-Medicare Social Security Act case, *Califano v. Sanders*, 430 U.S. 99 (1977). Jost observes that "[i]n combination, these cases sought to restrict judicial review of Social Security Act cases, including Medicare decisions, solely to judicial review of final administrative decisions, and then only where permitted by Congress." Jost, *supra*, note 19, at 47.

21. The Medicare Act is Title XVIII of the Social Security Act. Thus, a number of Medicare jurisdictional issues are similar to and rely upon the same statutory provisions as those that have arisen under the Social Security Act. See *Cambridge Hosp. Ass'n, Inc. v. Bowen*, 629 F. Supp. 612, 616 (D. Minn. 1986) ("Because the Social Security Act and the Medicare Act share a high degree of schematic similitude, many courts have stated that cases construing the former are of precedential value interpreting the latter.").

decision" is not merely a "judicially developed doctrine of exhaustion," but instead is "central to the requisite grant of subject matter jurisdiction," and therefore a "statutorily specified jurisdictional prerequisite" to suit.²²

The *Salfi* decision resulted from the challenge by a deceased wage earner's widow and stepchild to the constitutionality of Social Security Act provisions requiring a nine-month-long prior relationship with the deceased to receive survivors' benefits.²³ The district court found it had jurisdiction under 28 U.S.C. § 1331 on the ground that section 405(h) was merely a codification of the judicial doctrine of administrative exhaustion.²⁴ The district court then determined that exhaustion would be futile and waived the requirement.²⁵

The Supreme Court, however, found the district court had taken an "entirely too narrow" view of the scope of section 405(h).²⁶ Rejecting the lower court's conclusion that section 405(h) was merely a codification of the judicial doctrine of exhaustion, the Court made clear that a "final decision" of the Secretary is a statutorily specified jurisdictional requirement:

That the third sentence of section 405(h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that no action shall be brought under section 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted.²⁷

Turning to the plaintiff's constitutional claim, the Court found that although the action arose under the Constitution, it also arose under the Social Security Act because, "not only is it Social Security benefits which appellees seek to recover, but it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions."²⁸ Construing the "plain words" of the third sentence of section 405(h), the Court observed that the "Social Se-

22. *Salfi*, 422 U.S. at 764, 766.

23. *See id.* at 752-55.

24. *See id.* at 756-57.

25. *See Salfi v. Weinberger*, 373 F. Supp. 961, 964 (N.D. Cal. 1974).

26. *Salfi*, 422 U.S. at 757.

27. *Id.* The Court concluded that exhaustion is "something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility . . ." *Id.* at 766. The Court also made clear that a lower court "may not substitute its conclusion as to futility for the contrary conclusion of the Secretary . . ." *Id.*

28. *Id.* at 760-61.

curity Act itself provides jurisdiction for constitutional challenges to its provisions."²⁹ Indeed, the Court found section 405(h) does "not preclude constitutional challenges" but "simply requires that they be brought under jurisdictional grants contained in the Act . . . in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act."³⁰ Thus, the Court held section 405(h) also barred such claims under section 1331.³¹

In 1984, the Supreme Court reaffirmed *Salfi* and extended its holding to claims arising under the Medicare Act in the case of *Heckler v. Ringer*.³² In *Ringer*, four Medicare beneficiaries brought a section 1331 action challenging the Secretary's decision not to provide Medicare reimbursement to those who underwent a particular medical procedure.³³ The complaint alleged that a particular Medicare policy and agency ruling violated the Medicare and Administrative Procedures Acts, as well as the Due Process Clause of the Fifth Amendment.³⁴ Plaintiffs sought declaratory and injunctive relief, including invalidation of the agency ruling, as well as an order enjoining the Secretary from applying it.³⁵

Again, the Court held in the absence of administrative exhaustion, section 405(h) barred section 1331 jurisdiction over the action, although the plaintiffs sought a declaration that the Secretary's decision was improper rather than an order requiring payment.³⁶ Citing *Salfi*, the Court construed the "claim arising under language quite broadly to include any claims in which 'both the standing and substantive basis for the presentation' of the claims is the Social Security Act."³⁷ The Court reasoned "to be true to the language of the statute," the inquiry "must be whether the claim 'arises under' the Act, not whether it lends itself to a 'substantive' rather than 'procedural' label."³⁸ Because the plaintiffs' allegations were "inextricably intertwined"

29. *Id.* at 762.

30. *Id.*

31. *See id.* at 760-61.

32. 466 U.S. 602 (1984).

33. *See id.* at 604-05.

34. *See id.* at 611 n.7.

35. *See id.* at 611.

36. Only three of the plaintiffs had undergone the procedure at issue. One plaintiff had not undergone the procedure and would not do so until a court set aside the Secretary's determination. *See id.* at 614-16, 621-23.

37. *Id.* at 615.

38. *Id.* at 615 (citing *Mathews v. Eldridge*, 424 U.S. 319, 327 (1975)).

with their claims “arising under” the Medicare Act, the claims were justiciable solely under the Medicare statute, regardless of whether the claimant alleges violation of the Constitution or the Administrative Procedures Act, or seeks only declaratory and injunctive relief rather than an award of Medicare benefits.³⁹ The Court concluded that a “claim for future benefits” is a claim under section 405(h),⁴⁰ and that “all aspects” of any such claims must be “channeled” through the administrative process.⁴¹

Given the categorical nature of the Court’s application of section 405(h) in *Ringer* and *Salfi*, it is not surprising these decisions have formed the cornerstone of the Court’s subsequent decisions pertaining to the judicial review and jurisdictional provisions of the Medicare Act. Although some minor exceptions have been applied in rare cases,⁴² the Court has consistently held Medicare claims must be channeled, in the first instance, through the agency’s administrative process.⁴³ This was not the case, however, in the Supreme Court’s 1986 decision in *Bowen v. Michigan Academy of Family Physicians*.⁴⁴

39. *Id.* at 614.

40. *Id.* at 621-22.

41. *Id.* at 614.

42. The Secretary may waive the exhaustion requirement when exhaustion is deemed futile, *Ringer*, 466 U.S. at 617; *Matthews v. Diaz*, 426 U.S. 67, 76-77 (1976) (Secretary waived exhaustion because the only issue before the court was the constitutionality of the residency requirement for enrollment in Medicare Part B), and, under certain narrow circumstances, deference to the Secretary’s conclusion as to the utility of pursuing a claim through administrative channels may not be appropriate. See *Matthews v. Eldridge*, 424 U.S. 319 (1975) (procedural challenge to the Secretary’s denial of a predetermination hearing for benefits to a Social Security beneficiary was “collateral” to his claim for benefits, where showing was that the injury to the beneficiary would not be remedied by retroactive payments after exhaustion); *Bowen v. City of New York*, 476 U.S. 467 (1986) (exhaustion was not necessary because agency employed a secret policy that could not have been challenged by the plaintiffs and the ordeal of having to go through the administrative appeal process may trigger a severe medical setback—injury not recompensable through retroactive payments.).

43. In the 1999 Term, the Supreme Court held in a Medicare reimbursement reopening case that the Medicare provider was not entitled to judicial review of a Medicare fiscal intermediary’s refusal to reopen a cost report. In so doing, the Court rejected the provider’s “fallback” argument, concluding that judicial review under the federal question statute, 28 U.S.C. § 1331, was precluded by 42 U.S.C. §§ 405(h) and 1395ii because “both the standing and substantive basis for the presentation” of the plaintiff’s claim was the Medicare Act. *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 456 (1999) (citing *Ringer* 466 U.S. 602, 615 (1984)).

44. 476 U.S. 667 (1986).

B. Bowen v. Michigan Academy of Family Physicians and the "Amount/Methodology" Distinction

In *Bowen v. Michigan Academy of Family Physicians*, the Supreme Court addressed section 405(h) in a markedly different context and appeared to signal a limitation of the holdings of *Salfi* and *Ringer* by allowing a pre-exhaustion, anticipatory challenge to the *method* by which Medicare benefit amounts were determined rather than the actual amount of the benefits.⁴⁵

Michigan Academy involved a challenge by a group of physicians to the validity of a Medicare regulation authorizing payment of Part B benefits in different amounts for similar services.⁴⁶ At the time the case was decided, the Medicare Act completely precluded judicial review of Part B "amount determinations."⁴⁷ The Court noted a "strong presumption" in favor of judicial review of administrative action,⁴⁸ which can be overcome by congressional intent as evidenced by "specific language"⁴⁹ or by "inferences of intent drawn from the statutory scheme as a whole."⁵⁰ The Court found both the Medicare Act and its legislative history evidenced a Congressional intent to preclude from judicial review only "determinations of the amount of benefits to be awarded under Part B" and not matters which Congress did not delegate to private carriers, such as "challenges to the validity of the Secretary's instructions and regulations."⁵¹

Such a challenge, the Court determined, was "cognizable in courts of law."⁵² Because the Court found the claim raised by the physicians a challenge to the *method* by which amounts are determined, it concluded judicial review of their claim was not barred.⁵³ The Court also observed that the exhaustion require-

45. This distinction is commonly referred to as the "amount/methodology" distinction.

46. See *Michigan Academy*, 746 U.S. at 668.

47. See *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982). Part A of the Medicare Act provides insurance for hospital and related post-hospital services. Part B provides a voluntary program of supplemental medical insurance covering expenses not covered by the Part A program, such as reasonable charges for physicians' services, medical supplies, and laboratory tests.

48. *Michigan Academy*, 476 U.S. at 670.

49. *Id.* at 673.

50. *Id.* at 673 n.4.

51. *Id.* at 678.

52. *Id.* at 680.

53. See *id.* at 680 n.11.

ment could not apply to the physicians because "there is no hearing, and thus no administrative remedy, to exhaust."⁵⁴

Four months after *Michigan Academy*, however, Congress amended the Medicare Act to authorize administrative hearings and judicial review of Medicare Part B claims meeting certain amount-in-controversy thresholds for services rendered on or after January 1, 1987,⁵⁵ effectively affording Part B claimants the same administrative and judicial remedies as Part A claimants. As a result of this amendment,⁵⁶ "the lower courts have treated *Michigan Academy* effectively as a dead letter, recognizing its extraordinary nature,"⁵⁷ and extinguishing the "amount/methodology" distinction.⁵⁸

The circuit courts' rejection of the *Salfi-Ringer/Michigan Academy* distinction was unanimous⁵⁹ until the Seventh Circuit's decision in *Illinois Council on Long Term Care, Inc v. Shalala*.⁶⁰ The Seventh Circuit's *Illinois Council* decision not only viewed *Michigan Academy* as still viable, but also determined that *Michigan Academy* limited the scope of *Salfi* and *Ringer* to claims for reimbursement, thus allowing a pre-exhaustion challenge to Medicare regulations pertaining to health and safety standards for nursing homes.⁶¹ This disagreement in the circuits

54. *Id.* at 679 n.8.

55. See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(1), (b), 100 Stat. 1874, 2037-38 (1986) (codified at 42 U.S.C. § 1395ff (1994 and Supp. 1998)).

56. Prior to Congress' 1986 amendments to 42 U.S.C. § 1395ff, at least one court applied the *Michigan Academy* distinction and nonetheless dismissed for lack of subject matter jurisdiction a physician association's challenge to certain Medicare rules. See *Texas Med. Ass'n v. Sullivan*, 875 F.2d 1160, 1165-70 (5th Cir. 1989), *cert. denied*, 493 U.S. 1011 (1989).

57. Jost, *supra* note 19, at 48. "The holding of *Michigan Academy* was almost immediately mooted by Congress, which adopted a statute permitting judicial review of [Medicare] Part B decisions." *Id.*

58. *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama, Inc.*, 156 F.3d 1098, 1109 n.22 (11th Cir. 1998) ("The 1986 amendments extinguished the 'amount/methodology distinction established in [*Bowen v. Michigan Academy*]." (citing *Am. Academy of Dermatology v. Dep't of Health & Human Servs.*, 118 F.3d 1495, 1500 (11th Cir. 1997))). See also *Michigan Ass'n of Homes & Servs. for the Aging Inc. v. Shalala*, 127 F.3d 496, 500-01 (6th Cir. 1997); *Martin v. Shalala*, 63 F.3d 497, 503 (7th Cir. 1995); *St. Francis Med. Ctr. v. Shalala*, 32 F.3d 805, 807-12 (3d Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995); *Farkas v. Blue Cross & Blue Shield of Michigan*, 24 F.3d 853, 860 (6th Cir. 1994); *Abbey v. Sullivan*, 978 F.2d 37, 42-43 (2d Cir. 1992); *Nat'l Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1132-34 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1049 (1993).

59. See Jost, *supra* note 19, at 48.

60. See 143 F.3d 1072 (7th Cir. 1998).

61. See *id.* at 1075. The Seventh Circuit's analysis focused on Congress' post-*Michigan Academy* amendments. Referencing these amendments to 42 U.S.C.

set the stage for the Supreme Court's most recent discussion of the administrative-channeling provisions of the Medicare Act.

C. The Supreme Court's Decision In Shalala v. Illinois Council on Long Term Care, Inc.

In *Shalala v. Illinois Council on Long Term Care, Inc.*, an association of nursing homes filed a federal question jurisdiction suit against the Secretary, challenging the validity of certain Medicare health and safety regulations. After dismissal by the district court for lack of federal question jurisdiction,⁶² the plaintiffs appealed, and the Seventh Circuit reversed the dismissal. The Court of Appeals found the Court's holding in *Michigan Academy* to significantly modify *Salfi* and *Ringer*, limiting their scope to the Secretary's "amount determinations," and, thus, allowing the pre-exhaustion challenge.⁶³

The Supreme Court, however, rejected the Court of Appeals' holding, finding that section 405(h), as interpreted in *Salfi* and *Ringer*, "would clearly bar this section 1331 lawsuit."⁶⁴

Despite the urging of [Illinois] Council and supporting amici, we cannot distinguish *Salfi* and *Ringer* from the case before us. Those cases themselves foreclose distinctions based upon the "potential future" versus the "actual present" nature of the claim, the "general legal" versus the "fact-specific" nature of the challenge, the "collateral" versus "non-collateral" nature of the issues, or the "declaratory" versus "injunctive" nature of the relief sought. Nor can we accept a distinction that limits the scope of section 405(h) to claims for monetary benefits. Claims for money, claims for other benefits, claims of program eligibility, and claims that contest a sanction or remedy may all similarly rest upon individual fact-related circumstances, may all similarly dispute agency policy determinations, or may all

§ 1395ff(b)(1), which give Medicare providers an avenue to judicial review of amount determinations, the Seventh Circuit opined that "if something important happened in 1986, the point [was] lost on the Supreme Court which, in 1991, reiterated that [42 U.S.C.] § 1395ii does not affect regulatory challenges that are detached from any reimbursement request." *Id.* (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497-98 (1991)). The Seventh Circuit further indicated that the "point was lost" on it, too, because since 1986, the Seventh Circuit drew a distinction between pre-enforcement challenges to Medicare regulations (judicial review allowed) and requests for reimbursement (judicial review postponed until after the Secretary's final decision. *Id.* (citing *Martin v. Shalala*, 63 F.3d 497, 503-05 (7th Cir. 1995); and *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 483-87 (7th Cir. 1990, cert. denied. 498 U.S. 1012 1990)).

62. *Shalala v. Illinois Council on Long Term Care, Inc.*, 120 S. Ct. 1084 (2000).

63. *Illinois Council on Long Term Care*, 143 F.3d at 1075.

64. *Illinois Council*, 120 S. Ct. at 1092.

similarly involve the application, interpretation, or constitutionality of interrelated regulations or statutory provisions. There is no reason to distinguish among them in terms of the language or in terms of the purposes of section 405(h). Section 1395ii's blanket incorporation of that provision into the Medicare Act as a whole certainly contains no such distinction. Nor for similar reasons can we here limit those provisions to claims that involve "amounts."⁶⁵

Addressing its *Michigan Academy* decision, the Court concluded *Michigan Academy* did not modify the Court's earlier holdings by limiting the scope of section 405(h), as incorporated by section 1395ii, to "amount determinations."⁶⁶ The Court noted *Michigan Academy* involved a challenge to regulations under a subsequently-amended portion of the Medicare Act that did not provide for section 405(g) review of such decisions. Thus, the *Michigan Academy* decision only foreclosed application of section 405(h) where its application would preclude judicial review rather than channeling it through the agency.⁶⁷ The Court then observed that, as limited by the Court of Appeals, *Michigan Academy*

would have overturned or dramatically limited earlier precedents such as *Salfi* and *Ringer* . . . [and would] have created a hardly justifiable distinction between "amount determinations" and many similar HHS determinations. . . . And we do not understand why Congress . . . would have wanted to compel medicare patients, but not providers to channel their claims through the agency.⁶⁸

The Court also found unconvincing the Council's argument that its challenge(s) fell within the *Michigan Academy* exception because it can obtain no review unless it can obtain section 1331 review, noting that the Medicare Act and its regulations permit a dissatisfied nursing home to have an administrative hearing following a determination that it has failed to comply substantially with the statute, agreements, or regulations.⁶⁹ The Court concluded that the plaintiffs' members remained free,

after following the special review route that the statutes prescribe, to contest in court the lawfulness of any regulation or statute upon which an agency determination depends. The fact that the agency might not provide a hearing for that particular

65. *Id.* at 1094.

66. *Id.* at 1095.

67. *See id.* at 1095-96.

68. *Id.* at 1096.

69. *See id.* at 1097-98.

contention, or may lack the power to provide one [citations omitted], is beside the point because it is the 'action' arising under the Medicare Act that must be channeled through the agency. [citations omitted].⁷⁰

As the discussion above demonstrates, the Supreme Court's broad reading of the preclusive effect of sections 405(g) and (h) means Medicare providers and suppliers cannot obtain judicial review under the federal question jurisdiction statute to mount an anticipatory challenge to Medicare regulations. Rather, 42 U.S.C. §§ 405(g) and (h) require Medicare providers to proceed through the provisions of the Medicare statute to obtain judicial review of their claims. While the issue remains controversial, the *Illinois Council* holding seems simple enough. As our ensuing discussion will reveal, however, there is more to section 405(h)'s preclusion than meets the eye.

II. SECTION 205(H) OF THE SOCIAL SECURITY ACT

Although the third sentence of section 405(h) seems to preclude only those actions brought pursuant to federal question jurisdiction (§ 1331) and actions brought against the United States (§ 1346), a number of courts have determined that other bases of jurisdiction, such as diversity (§ 1332) and bankruptcy (§ 1334), are included within the jurisdictional bar of section 405(h). In reaching their conclusions as to the scope of section 405(h), those courts looked beyond the plain language of section 405(h) as it appears in the United States Code, and relied upon amended section 205(h) of the Social Security Act, the legislation that serves as the basis for section 405(h).

A. *Section 205(h) and Section 24 of the Judicial Code*

Upon its original enactment, section 205(h) of the Social Security Act barred all actions "arising under" the Social Security Act brought pursuant to section 24 of the Judicial Code.⁷¹ Sec-

70. *Id.* at 1099.

71. As originally enacted, section 205(h) read:

The findings and decision of the Board after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Board shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Board, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title.

Social Security Act Amendments of 1939, Pub. L. No. 379, § 205(h), 53 Stat. 1360, 1371 (1939).

tion 24 of the Judicial Code of March 3, 1911,⁷² then codified at 28 U.S.C. § 41, included nearly all grants of federal jurisdiction.⁷³ Consequently, the jurisdictional bar of section 205(h) was exceptionally broad.

In 1948, however, the Judicial Code was repealed and replaced.⁷⁴ Thereafter, the jurisdictional provisions of the district courts were codified into thirty-two separate sections, comprising 28 U.S.C. §§ 1331-1348, 1350-1357, 1359, 1397, 1399, 2361, 2401, and 2404.⁷⁵ Because Congress did not concurrently amend section 205(h) to reflect these changes, section 205(h) continued to reference the repealed section 24, from 1948 until 1976. Likewise, 42 U.S.C. § 405(h) continued to refer to the repealed section 41 of Title 28.⁷⁶

In 1976, the Office of Law Revision Counsel, the "codifiers" of the United States Code,⁷⁷ attempted to remedy this oversight. However, their erroneous recodification of section 405(h) set the stage for the present confusion as to the proper scope of the jurisdictional bar of the Medicare Act. Rather than simply changing section 405(h) to reflect the change to section 24 of the Judiciary Act, the text of section 405(h) instead was altered from its general bar of jurisdiction ("all actions under section 24 of the Judicial Code") to its present form, which precludes only those actions "brought under section 1331 or 1346 of Title 28."⁷⁸ Thus, their revision appeared to effect a significant substantive change to section 405(h), limiting its jurisdictional bar solely to federal question jurisdiction and actions brought against the United States.

72. See Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087-1168 (repealed 1948).

73. See *Weinberger v. Salfi*, 422 U.S. 749, 756 n.3 (1975) ("The literal wording of this section bars actions under 28 U.S.C. § 41. At the time § 405(h) was enacted, and prior to the 1948 recodification of Title 28, section 41 contained all of that title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants . . .").

74. See Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992.

75. See "Historical and Statutory Notes, Codifications" 42 U.S.C.A. § 405(h) (West 1991).

76. See *Salfi*, 422 U.S. at 758 n.4.

77. The United States Code is prepared and published by the Office of Law Revision Counsel, U.S. House of Representatives. See 2 U.S.C. § 285 (1994). The purpose of the Office is to keep a current and official codification of the laws of the United States, see *id.* § 285(a), and to "remove ambiguities, contradictions, and other imperfections both of substance and form" from the laws enacted. *Id.* § 285(b).

78. "Historical and Statutory Notes," 42 U.S.C.A. § 405(h) (West 1991); see also *Bodimetric*, 903 F.2d at 488-89.

Despite the codifiers' change to section 405(h), section 205(h) remained unaltered. Since Congress neither changed section 205(h), nor approved the revision to section 405(h), the codifiers' revision had no legal effect.⁷⁹ Section 205(h) was still the controlling law, and courts were required to interpret and apply section 205(h) as they had been doing between 1948 and 1976.⁸⁰ Accordingly, the scope of section 205(h) did not change, and it remained a bar to any Medicare-related lawsuit founded on a jurisdictional basis set forth in section 24 of the Judicial Code.

B. The 1984 Technical Correction of Section 205(h)

In 1984 Congress finally acted to amend section 205(h)'s reference to "section 24 of the Judicial Code." Up to this point, the scope of the jurisdictional bar was still clear; courts and litigants could still look to the controlling language of section 205(h) and section 24 of the Judicial Code.⁸¹ Congress' remedy, however, only complicated matters. For reasons that remain unclear, Congress amended section 205(h) by a "technical correction" that seemed to substantively modify the section by adopting the codifiers' revised language of section 405(h).

In the Deficit Reduction Act of 1984 ("DEFRA"), Congress included a section entitled "Subtitle D—Technical Corrections" under the subheading "Other Technical Corrections in the Social Security Act and Related Provisions." Under this subheading, Congress inserted the following language: Section 205(h) of such Act is amended by striking out "section 24 of the Judicial

79. Although the codifiers placed the reference to sections 1331 and 1346 into 42 U.S.C. 405(h), such changes, "made by a codifier without the approval of Congress . . . should be given no weight." *North Dakota v. United States*, 460 U.S. 300, 311 n.13 (1983) (citing *United States v. Welden*, 377 U.S. 95, 99, n.4 (1964)).

80. See *Bussey v. Harris*, 611 F.2d 1001, 1004-05 n.4 (5th Cir.1980); *Friendship Villa—Clinton, Inc. v. Buck*, 512 F. Supp. 720, 723 n.4 (D. Md.1981) ("It is to be noted that all parts of section 24 are eliminated from that 1976 codification other than sections 1331 and 1346. That elimination is seemingly an inadvertent codification error, since section 24 of the Judicial Code, as it stood when the present section 205 of the Social Security Act was adopted, . . . included a number of jurisdictional provisions, including not only sections 1331 and 1346, but also section 1343. Since 42 U.S.C. has never been enacted into law . . . the provision as enacted would appear in any event to control over the codification."); *Fox v. Harris*, 488 F. Supp. 488, 493 n. 10 (D.C. Cir. 1980). See also *Morris v. Weinberger*, 401 F. Supp. 1071, 1084 (D. Md. 1975) (pre-recodification); *Jamieson v. Weinberger*, 379 F. Supp. 28, 35-36 (E.D. Pa. 1974) (pre-recodification).

81. See *Jamieson*, 379 F. Supp. at 35-36.

Code of the United States" and inserting in lieu thereof "section 1331 or 1346 of title 28, United States Code."⁸²

Thus, by way of a "technical correction," Congress appeared to enact the same substantive change to the scope of section 205(h) as the Office of Law Revision Counsel made to section 405(h). Indeed, were this all that Congress had said on the matter, there would be little doubt that the scope of the jurisdictional bar of the Medicare Act was, in fact, limited to 28 U.S.C. §§ 1331 and 1346. Congress, however, did not stop there. To ensure that no substantive changes were imputed to the existing statutes covered by the technical corrections, Congress furnished, *by way of statute*, explicit instructions on how the technical corrections should be construed. In the next subsection of DEFRA, Congress directed that: "[T]he amendments made by section 2663 shall be effective on the date of the enactment of this Act; but none of such amendments shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date."⁸³

By stating that "none of such amendments shall be construed as changing or affecting any . . . interpretation which existed," it is quite clear, notwithstanding the actual language of the "correction," Congress did not intend that the technical correction to alter the original scope of section 205(h) or any of the other statutes covered by section 2663.⁸⁴ Consequently, those bases of jurisdiction barred under section 205(h) before the technical correction, such as diversity and bankruptcy, remain barred after the technical corrections by Congress in DEFRA.⁸⁵

82. Pub. L. No. 98-369 § 2663(a)(4)(D), 98 Stat. 494, 1162 (1984) (amending 42 U.S.C. § 405 (1982)).

83. § 2664(b), 98 Stat. at 1171-72.

84. Although sparse, the legislative history of the technical correction also supports this conclusion. The House Conference Report submitted with the legislation contained the following statement:

Subtitle D contains a number of minor technical amendments to the Social Security Act and the Internal Revenue Code, to correct clerical and other minor errors either resulting from the Social Security Amendments of 1983, or already existing in those acts.

H.R. Conf. Rep. No. 98-861 at 1413 (1984), *reprinted in* 1985 U.S.C.C.A.N. 697, 2101. No Senate report was submitted with the legislation.

85. When a literal application of a statute contravenes the express intentions of Congress, the Supreme Court has consistently held that the *intentions* of Congress must prevail. *See* *United States v. Ron Pair*, 489 U.S. 235, 242 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (When "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions

*C. The Statutes At Large, Positive Law, and the
United States Code*

As straightforward as this discussion of section 405(h) has been, there is another, more elementary level of analysis to be considered, based on the fundamental difference between the Statutes at Large, of which DEFRA sections 2663 and 2664 are a part, and the non-positive law⁸⁶ codifications contained within the United States Code, of which 42 U.S.C. § 405(h) is a part.

As a starting point for this analysis, we must return to the genesis of federal laws: the Statutes at Large. When laws and concurrent resolutions are enacted during each regular session of Congress, they are compiled and published as the United States Statutes at Large.⁸⁷ In evidentiary terms, the Statutes at Large are "legal evidence of laws . . . in all the courts of the United States."⁸⁸ All litigants are charged with knowledge of

of its drafters . . . those intentions must be controlling."). Moreover, the fact that Congress styled the change as a "technical correction" also makes clear Congress intended no substantive change. *See also* North Broward Hosp. Dist. v. Shalala, 172 F.3d 90, 97 (D.C. Cir. 1999) (Designation of amendment as a "technical correction" suggests "that only clarification and not substantive change was intended."); *Muniz v. Hoffman*, 422 U.S. 454, 470 (1975) ("It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed." (quoting *United States v. Ryder*, 110 U.S. 729, 740 (1884))).

86. Positive law is a "[l]aw actually and specifically enacted or adopted by proper authority for the government of an organized jural society." BLACK'S LAW DICTIONARY, 1162 (6th ed. 1990). Prior to 1926, the positive federal law was contained in a volume entitled "Revised Statutes of 1875" and then in subsequent volumes of the United States Statutes at Large. *See* LaCrosse v. Commodity Futures Trading Comm'n, 137 F.3d 925, 927 n.1 (7th Cir. 1998) (citing JACOBSTEIN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 165 (6th ed. 1994)). The United States Code was published in 1926 and included all of the public and general laws still in force. Unlike the Revised Statutes of 1875, however, Congress never enacted the United States Code in its entirety. Instead, the Office of Law Revision Counsel submits the United States Code to Congress, title by title, for enactment into "positive" law. Currently, less than half of the titles of the United States Code have been enacted by Congress. *Id.* The titles specifically enacted by Congress are titles 1, 3, 4, 5, 6, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 44, 46 and 49. *See* "United States Code Titles as Positive Law," 1 U.S.C.A. § 204 (West 1997 & West Supp. 2000). Among the titles that have not been enacted into positive law by Congress is title 42, under which the Medicare program is set out. *See* *United States v. Ward*, 131 F.3d 335, 339-40 (3d Cir. 1997).

87. *See* 1 U.S.C. § 112 (1994). Title 1 of the United States Code, which has been enacted into positive law by Congress also provides that titles of the U.S. Code so enacted into positive law are "legal evidence" of those laws. *Id.*

88. *Id.*; *see also* *Five Flags Pipeline Co. v. Dept. of Transp.*, 854 F.2d 1438, 1440 (D.C. Cir. 1988).

the United States Statutes at Large.⁸⁹ Once enacted, Statutes at Large are then copied and organized by subject matter into a code, *i.e.*, they are “codified” by the Office of Law Revision Counsel. The codified, non-positive law versions of the Statutes at Large, as found in the United States Code, establish “prima facie the laws of the United States.”⁹⁰ In other words, unlike the Statutes at Large, codified, non-positive sections of the United States Code generally serve as something less than “legal evidence” of the law, whereas the official source of the United States laws is the Statutes at Large.⁹¹ In fact, when the language of the Statutes at Large conflicts with language in the corresponding section in the United States Code that has not been enacted into positive law, the Supreme Court has consistently held that the language of the Statutes at Large, not the United States Code, controls.⁹²

Application of these doctrines leads to the conclusion that, when interpreting the scope of section 405(h), a court must look beyond the language contained in the United States Code, to the Statutes at Large. Section 2664 of the Statutes at Large makes clear that Congress intended all jurisdictional bases precluded by the original version of section 205(h), as set out in section 24 of the Judicial Code, to remain barred today. Furthermore, Congress’ statement in section 2664 that technical corrections to section 205(h) were not to be “construed as changing or affecting any . . . interpretation” of section 205(h) which existed prior to the amendment, is not merely a suggestion or legislative history, *it is the law*. Thus, the jurisdictional bar of the Medicare Act, as set out in section 405(h), is not limited to sections 1331 and 1346. Instead, it extends, by statute, to

89. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Alder Terrace, Inc., v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998).

90. Only when enacted into positive law by Congress are the provisions of the United States Code regarded as “legal evidence of the law therein contained, in all courts of the United States” 1 U.S.C. § 204(a)(1994).

91. See *Royer’s Inc. v. United States*, 265 F.2d 615, 618 (3rd Cir. 1959).

92. See *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (citing *Stephan v. United States*, 319 U.S. 423, 426 (1943) (The United States Code cannot prevail over the Statutes at Large when the two are inconsistent.)). The federal circuit courts of appeals have similarly held. See *Lacrosse v. Commodity Futures Trading Comm’n*, 137 F.3d 925, 927 n.1 (7th Cir. 1998); *United States v. Carroll*, 105 F.3d 704, 744 (1st Cir. 1997); *Cheney R.R. Co., Inc. v. Railroad Ret. Bd.*, 50 F.3d 1071, 1076 (D.C. Cir. 1995); *Five Flags Pipeline Co. v. Dep’t of Transp.*, 854 F.2d 1438, 1440 (D.C. Cir. 1988).

28 U.S.C. §§ 1331-1348, 1350-1357, 1359, 1397, 1399, 2361, 2401, 2404.⁹³

D. Case Law Interpreting Section 2664 and the Scope of Section 405(h)

In light of the foregoing, it is not surprising that the majority of courts that have carefully examined section 405(h) and its history have concluded the Medicare Act's jurisdictional bar extends beyond sections 1331 and 1346. These decisions primarily address diversity (§ 1332) and bankruptcy (§ 1334) jurisdiction. Other courts also have analyzed section 405(h) in the context of mandamus jurisdiction. Because mandamus originally was not included in the jurisdictional bar of section 405(h), most, but not all, of those courts concluded mandamus jurisdiction is not now barred by section 405(h).

1. Diversity Claims "Arising Under" the Medicare Act

Two Courts of Appeals have considered the effect of the 1984 technical correction to section 405(h) in the context of diversity claims. Both found section 405(h) should be interpreted as barring those bases of jurisdiction originally set forth in section 24 of the Judicial Code, including diversity jurisdiction. In *Bodimetric Health Services, Inc. v. Aetna Life & Casualty*,⁹⁴ a Medicare provider alleged its Medicare intermediary regularly denied claims for reimbursement to improve its contract performance evaluation and to retain its contract with HCFA. The plaintiff brought suit against the intermediary, asserting diversity jurisdiction, seeking damages for, among other things, fraud.

The intermediary moved to dismiss for lack of subject matter jurisdiction, alleging that the exclusive review provisions of the Medicare Act barred Bodimetric from pursuing its challenge in federal court. The provider argued that jurisdiction was appropriate because section 405(h) does not expressly preclude actions brought pursuant to 28 U.S.C. § 1332.⁹⁵ The Seventh Circuit rejected the provider's argument, finding "a close reading of the statute [42 U.S.C. § 405(h)] . . . does not support such a straightforward result."⁹⁶ The *Bodimetric* Court observed that upon its original enactment, section 405(h) barred all actions

93. See *supra* note 78; see also *supra* text accompanying note 78.

94. 903 F.2d 480 (7th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990).

95. See *id.* at 488.

96. *Id.*

brought pursuant to 28 U.S.C. § 41, which “contained [virtually] all of the grants of jurisdiction to the United States district courts under Title 28.”⁹⁷ The *Bodimetric* Court concluded that in section 2664(b):

[C]ongress clearly expressed its intent not to alter the substantive scope of section 405(h). Because the previous version of section 405(h) precluded judicial review of diversity actions, so too must newly revised section 405(h) bar these actions. Any other interpretation of this section would contravene section 2664(b) by ‘changing or affecting [a] right, liability, status, or interpretation’ of section 405(h) that existed before the Technical Corrections were enacted.⁹⁸

More recently, the Eighth Circuit reached the same conclusion in *Midland Psychiatric Associates, Inc. v. Mutual of Omaha Insurance Co.*⁹⁹ Like the provider in *Bodimetric*, the Medicare provider in *Midland* argued that its claim, based on diversity jurisdiction, did not fall within the scope of section 405(h). The Eighth Circuit also concluded that, despite the lack of reference to section 1332 in section 405(h), jurisdiction under 28 U.S.C. § 1332 remained precluded because it was precluded under 28 U.S.C. § 41, the earlier version of section 405(h).¹⁰⁰ In so holding, the Eighth Circuit emphasized that when Congress revised section 405(h) in 1984, it “made clear that no substantive change in the law was intended.”¹⁰¹

2. Bankruptcy Claims “Arising Under” the Medicare Act

The intersection between the Bankruptcy Code’s grant of jurisdiction, 11 U.S.C. § 1334, and section 405(h) has resulted in much literature¹⁰² and several lower court decisions. While re-

97. *Id.*

98. *Id.* at 489.

99. 145 F.3d 1000 (8th Cir. 1998).

100. *See id.* at 1004.

101. *Id.*; *see also* Total Renal Labs., Inc. v. Shalala, 60 F. Supp. 2d 1323, 1331 (N.D. Ga. 1999); Midland Psychiatric Assoc., Inc. v. United States, 969 F. Supp. 543, 548-50 (W.D. Mo. 1997); Schwartz v. Medicare, 832 F. Supp. 782, 789 (D.N.J. 1993).

102. *See* Commentary, *Judicial Review: The Preclusive Effect of the Jurisdictional Provisions of the Medicare Act*, 26 SOC. SEC. REP. SER. 791 (1989); George F. Magera, Note, *The Bankruptcy Code, Medicare Regulations and the Medicare/Provider Relationship in Bankruptcy: When May the Government Recover Medicare Overpayments From Bankrupt Health Care Providers?*, 54 U. PITT. L. REV. 1085 (1993); Samuel R. Maizel, *Look Out For the Roadblocks*, 17 AM. BANKR. INST. J. 16 (1998); Samuel R. Maizel & Judith A. Waltz, *Injunctive Relief in Health Care Insolvencies*, 24 CAL. BANKR. J. 215, 233-35 (1998); Robert G. Richardson, *Accident Scene—Medicare and Bankruptcy Collide*, 14 AM. BANKR. INST. J. 10 (1995).

sults have been mixed, most courts, like the Seventh Circuit in *Bodimetric*, have concluded that present-day section 405(h) remains a bar to actions whose jurisdictional basis was originally precluded, including those based on section 1334.¹⁰³

The first published decision applying *Bodimetric's* section 405(h) analysis to bankruptcy court jurisdiction under section 1334 was *In re St. Mary Hospital*.¹⁰⁴ In *St. Mary Hospital*, the Bankruptcy Court traced section 405(h)'s origins to 1939, when it barred all actions brought pursuant to 28 U.S.C. § 41, including the grant of bankruptcy jurisdiction to the district court

103. See *Home Comp Care, Inc. v. Dept. of Health & Human Servs.* (*In re Home Comp Care*), 221 B.R. 202, 205-06 (Bankr. N.D. Ill. 1998); *AHN Homecare, L.L.C. v. HCFA* (*In re AHN Homecare*), 222 B.R. 804, 809-10 (Bankr. N.D. Tex. 1998); *In re Southern Inst. for Treatment & Evaluation, Inc.*, 217 B.R. 962, 965 (Bankr. S.D. Fla. 1998); *In re St. John's Home Health Agency, Inc.*, 173 B.R. 238, 244 (Bankr. S.D. Fla. 1994); *In re Upsher Lab, Inc.*, 135 B.R. 117, 119-20 (Bankr. W.D. Mo. 1991); *Sullivan v. Hiser* (*In re St. Mary Hosp.*), 123 B.R. 14, 17 (Bankr. E.D. Pa. 1991). It is important to note that, while a number of bankruptcy courts have allowed Medicare claims to go forward, many of those courts simply assumed, without analyzing section 405(h) or section 2664 of DEFRA, that they had jurisdiction over Medicare claims. For example, although the Third Circuit Court of Appeals found jurisdiction in *In re University Medical Center*, 973 F.2d 1065, 1072-73 (3d Cir. 1992), it did so without discussing sections 2663 and 2664 of DEFRA, the history of section 405(h), or applicable case law. Instead, the court avoided an application of section 405(h) by finding that the adversary action commenced by the debtors was not an action "arising under" the Medicare Act, but was instead an action falling under the Bankruptcy Code. In *University Medical Center*, a provider brought an adversary proceeding, alleging the Secretary violated the automatic stay when the fiscal intermediary withheld postpetition reimbursement to recover prepetition overpayments. After noting "the parties stipulated both to the amounts of the overpayments . . . and to the separate pursuit of . . . administrative processes set forth in the Medicare statute," *id.* at 1073, the court framed the claim as one arising under the Bankruptcy Code, not the Medicare Act. *Id.* As such, it was not "inextricably intertwined" with the Secretary's reimbursement determination and was not subject to the jurisdictional bar set out in section 405(h). *Id.* Furthermore, to the extent the debtors in *University Medical Center* sought the payment of Medicare funds, the Supreme Court has made clear that a claim for payment of Medicare funds arises under the Medicare Act and is thus bound by the Act's jurisdictional requirements. See *Heckler v. Ringer*, 466 U.S. 602, 614-15 (1984). See, e.g., *In re Home Comp Care*, 221 B.R. at 206.

Likewise, the Ninth Circuit Court of Appeals' decision of *Sullivan v. Town & Country Nursing Home Serv., Inc.*, 963 F.2d 1146 (9th Cir. 1992), also failed to discuss sections 2663 and 2664 of DEFRA, the history of section 405(h), or relevant case law. The primary focus of *Town & Country* was 11 U.S.C. § 106 and the issue of sovereign immunity, not the relationship between 28 U.S.C. § 1334 and 42 U.S.C. § 405(h). Thus, the Ninth Circuit did not fully analyze section 405(h). Instead, it simply looked to the text of section 405(h) and noted section 1334 was not included there. Finally, the holding of *Town & Country* that premises section 106 as an independent grant of jurisdiction has been superseded by statute, the Bankruptcy Reform Act of 1994. See Pub. L. No. 103-394, § 702(b)(2)(B), 108 Stat. 4150 (1994) (codified at 11 U.S.C. § 101 (1994)).

104. See 123 B.R. 14 (E.D. Pa. 1991).

under section 41(19), and concluded that had the dispute been brought then, it would have been barred.¹⁰⁵ Further analyzing the replacement of section 41 of the Judicial Code, the current section 405(h), the 1976 revisions of the "Office of Law Revision," and Congress' 1984 amendments in the Deficit Reduction Act of 1984, the bankruptcy court noted that in section 2664, Congress "cautioned the courts not to interpret the 'Technical Corrections' as substantive changes." Thus, the court concluded that "Bankruptcy actions, like diversity actions, were barred under the prior codification of section 405(h) and remain so today."¹⁰⁶

St. Mary Hospital's conclusion that section 1334 jurisdiction remained precluded by section 405(h) was followed in another bankruptcy appeal decided in the same year, *In re Upsher Laboratories, Inc.*¹⁰⁷ Like the *St. Mary Hospital* court, the *Upsher* court traced the origins and subsequent amendments to section 405(h) and, likewise, concluded the "clear effect" of section 2664(b) of the Deficit Reduction Act of 1984 "is that since the district court could not take jurisdiction of a Social Security dispute prior to exhaustion of the administrative remedy by exercising its bankruptcy jurisdiction previous to the revision, it cannot do so after the revision."¹⁰⁸ Significantly, the *Upsher* court stated that "[i]n giving effect to this statement from the statute, this court is not relying on mere legislative history to interpret the statute. The statement comes directly from the enacted statute and must be given full effect."¹⁰⁹

Subsequently, the bankruptcy court in *In re St. Johns Home Health Agency, Inc.*,¹¹⁰ also concluded that section 1334 jurisdiction over Medicare disputes remained barred by present-day

105. See *id.* at 17 (citing Social Security Act Amendments of 1939, Pub. L. No. 379, § 205(h), 53 Stat. 1360, 1371 (1939) (codified at 42 U.S.C. § 402(h) (1982)).

106. *Id.* at 17.

107. 135 B.R. 117 (Bankr. W.D. Mo. 1991).

108. *Id.* at 119-20.

109. *Id.* at 120. Some writers have suggested that the government "relies on legislative history" to support its position that section 405(h) includes 28 U.S.C. § 1334 within its jurisdictional bar. These writers further posit that section 405(h)'s "legislative history" is "vague enough to make the exact intent of Congress subject to dispute." Samuel R. Maizel & Judith A. Waltz, *Injunctive Relief Actions in Healthcare Insolvencies*, 24 CAL. BANKR. J. 215, 234-35. Not only did the *Upsher* court find Congress' intent clear, it also noted that Congress' intent is set out by statute in section 2664(b) of the Deficit Reduction Act of 1984 and is not "mere legislative history." *Upsher*, 135 B.R. at 120.

110. 173 B.R. 238 (Bankr. S.D. Fla. 1994).

section 405(h).¹¹¹ To reach this result, the *St. Johns* court analyzed the origins of, and amendments to, section 405(h), as well as earlier decisions reaching the same result—*In re St. Mary Hospital*, *In re Upsher Laboratories*, and *Bodimetric*.¹¹² Key to *St. Johns*' reasoning was section 2664 of DEFRA, the statute in which Congress expressly forbade a change in interpretation of section 405(h).¹¹³

The most recent lower court decision to analyze historical section 405(h) and find that section 1334 jurisdiction remains barred is *In re AHN Homecare*.¹¹⁴ The bankruptcy court did so, however, with a twist.¹¹⁵ As with earlier decisions, the *AHN* court also analyzed section 405(h)'s history and relied extensively on the *St. Mary Hospital* decision, which it approvingly found to be "the most extensive and detailed analysis of the jurisdiction intersection of section 405(h) and section 1334."¹¹⁶

111. *See id.* at 244-45.

112. *See id.* at 244 (citations omitted).

113. *See id.* (citing Pub. L. 98-369, § 2664(b), 98 Stat. 1162, 1171-72 (1984)).

114. *See* 222 B.R. 804 (Bankr. N.D. Tex. 1998).

115. *See id.* at 808. The "twist" in *AHN*'s analysis of the "intersection" between sections 405(h) and 1334 comes not from its analysis of historical section 405(h), but rather from a decision from the Fifth Circuit Court of Appeals that was reviewed by the Supreme Court, *MCorp Fin., Inc. v. Bd. of Governors*, 900 F.2d 852 (5th Cir. 1990), *rev'd in part*, 502 U.S. 32 (1991). In *MCorp*, a specialized banking statute, 12 U.S.C. § 1818(i), prohibited judicial review until administrative proceedings were completed. The plaintiff in *MCorp*, a financial institution, argued that section 1334 of Title 28 conferred bankruptcy court jurisdiction over the dispute despite the prohibitions of the banking statute. The Fifth Circuit Court of Appeals in *MCorp* held section 1334 did not confer bankruptcy court jurisdiction because such an interpretation of section 1334 would "impliedly repeal" the specialized banking statute, 12 U.S.C. § 1818(i). The Court of Appeals noted an implied repeal of a statute is "highly disfavored" and will only be held to occur if there is a "positive repugnancy" between two statutory provisions. *MCorp Fin.*, 900 F.2d at 855-56. Thus, absent clear intent to the contrary, a specific statute will not be controlled by a general one, regardless of the priority of enactment. *Id.* at 856. Since Congress "revealed no intent to supersede the specific jurisdictional bar [of 12 U.S.C.] § 1818(i) in the legislative history of the Bankruptcy Reform Act" the Court of Appeals declined "to imply any affirmative powers to the bankruptcy court from Congress' failure to act" in that area. *Id.* at 857 (citations omitted). More fundamentally, the Court of Appeals examined the plain language of section 1334(b) and its legislative history and concluded that neither that statute nor its legislative history reflected a Congressional intent for bankruptcy court jurisdiction to supersede the exclusive jurisdiction of an administrative agency or reinvest the courts with jurisdiction barred by the banking statute. *Id.* at 855. This aspect of the Court of Appeals' holding was upheld by the Supreme Court. *See Board of Governors of the Fed. Reserve v. MCorp Fin. Inc.*, 502 U.S. 32, 41 (1991). The *AHN* court concluded that "[A]s in *MCorp*, the legislative history of section 1334 evidences no intention to make its general provisions override the specific provisions enumerated in section 405(h)." *AHN*, 222 B.R. at 809.

116. *Id.* at 807-08 (citing *In re St. Mary Hosp.*, 123 B.R. 14 (E.D. Pa. 1991)).

"Such a reading," (the one given by the court in *St. Mary Hospital*) the *AHN* court concluded, "is fully consistent with the intent of Congress."¹¹⁷

In contrast to the *Bodimetric* line of cases,¹¹⁸ a minority of jurisdictions have addressed the question of Medicare jurisdictional preclusion and concluded section 405(h) does not preclude section 1334 jurisdiction. For example, in *In re First American Health Care of Georgia, Inc.*,¹¹⁹ the court reasoned it had jurisdiction under section 1334 to adjudicate a claim under the Medicare Act because Congress, when it revised the Bankruptcy Code in 1984, had the opportunity to include bankruptcy jurisdiction in section 405(h), but did not.¹²⁰ The *First American* court also found noteworthy the proximity of the Bankruptcy Code revision and the technical correction. Noting that "only eight days subsequent to the enacting of Section 1334, Congress revised Section 405(h)," the court found jurisdiction because "Congress, when presented with two opportunities, failed to exclude from the jurisdiction of the bankruptcy courts all actions arising under the Medicare program."¹²¹ Surprisingly, the *First American* court arrived at its conclusion without considering (or even discussing) Congress' directive on construction of the technical correction contained in section 2664, the section's history, or the overall legislative scheme of the Medicare Act. This failure led one district court to explicitly reject the *First American* decision.¹²²

Another decision, *In re Healthback*,¹²³ also found bankruptcy jurisdiction was not precluded by section 405(h). The *Healthback* court, citing the Supreme Court's decision in *United States v. Ron Pair Enterprises, Inc.*,¹²⁴ determined that, because section 405(h) does not explicitly make reference to 28 U.S.C. § 1334, the court was required to apply "the plain language of the statute."¹²⁵ The *Healthback* court, however, omitted a critical element of the Supreme Court's directive in the *Ron Pair*

117. *Id.*

118. See *supra* note 103 and cases cited therein.

119. 208 B.R. 985, 988 (Bankr. S.D. Ga.1996).

120. *Id.* at 988-89.

121. *Id.*

122. *Home Comp Care, Inc. v. United States Dept. of Health & Human Servs. (In re Home Comp Care)*, 221 B.R. 202, 206 n.2 (Bankr. N.D. Ill.1998) (rejecting *First American* based on the Seventh Circuit's reasoning in the *Bodimetric* decision).

123. 226 B.R. 464 (Bankr. W.D. Okla. 1998).

124. 489 U.S. 235 (1989).

125. *Healthback*, 226 B.R. at 469.

decision. In *Ron Pair*, the Supreme Court indicated that a court *must* look beyond the language of the statute when the “literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”¹²⁶ The Supreme Court went on to state that “[in] such cases, the intention of the drafters, rather than the strict language, controls.”¹²⁷ In section 2664, Congress clearly expressed its intention that the technical corrections contained in section 2663 not be construed so as to change the interpretation of the statutes it was correcting, including section 205(h). Because Congress’ express intention is at odds with the language of the revised section 205(h), the intention of the drafters, rather than the strict language, controls.¹²⁸

However, unlike the *First American* court, the *Healthback* court did address Congress’ instruction on the construction of the technical correction set out in section 2664. Yet, despite the clarity of Congress’ mandate in section 2664, the *Healthback* court rejected section 2664 as inapplicable, stating:

As the statement of Congress in the public law concerning the changes only addressed substantive law and as 42 U.S.C. § 405(h), in its limitation on jurisdiction, concerns procedural law, it is obvious that the statement of Congress in the public law did not apply to the changes in 42 U.S.C. § 405 which had to do with procedural law. Thus, the omission of 28 U.S.C. § 1334, which is procedural in nature, from 42 U.S.C. § 405(h) cannot be attributed to an oversight. Therefore, 42 U.S.C. § 405(h) does not limit bankruptcy jurisdiction under 28 U.S.C. § 1334 in this matter.¹²⁹

This “obvious” conclusion, however, is not supported by the language of the technical amendment. Although the *Healthback*

126. *Ron Pair*, 489 U.S. at 242 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

127. *Id.* This doctrine has been widely applied in the context of the Bankruptcy Code. See, e.g., *In re Emery*, 132 F.3d 892, 895-96 (2d Cir. 1998) (holding that the “plain language” of section 727 (d) of the Bankruptcy Code did not bar proceedings to revoke discharge when to do so would be at odds with the intention of Congress); *In re Waugh*, 109 F.3d 489, 492-93 (8th Cir. 1997) (rejecting the application of the “plain meaning” of section 108 (c) of the Bankruptcy Code because literal application of section 108 (c) would frustrate the intent of Congress); *Floyd v. United States Postal Serv.*, 105 F.3d 274, 275-76 (6th Cir. 1997) (rejecting the literal application of 28 U.S.C. § 1915 (a) (1) because, among other things, Congress intended differently); *In re Investment Bankers, Inc.*, 4 F.3d 1556, 1564-65 (10th Cir. 1993) (holding that Congressional intent guides the interpretation of various statutes establishing the jurisdiction of bankruptcy courts).

128. *Id.*

129. *Healthback*, 226 B.R. at 473.

court purportedly identified a “procedure/substance” distinction within the technical correction, Congress expressed no such distinction in sections 2663 or 2664, or for that matter, in any other part of the Medicare or Social Security Acts. Indeed, the language in section 2664, that “none of such amendments shall be construed as changing or affecting any . . . interpretation which existed,” admits of no exceptions, and states quite clearly that Congress intended none of the statutes corrected by section 2663 to be interpreted any differently as a result of the technical correction.

Furthermore, although the *Healthback* court reasoned it should apply the *Ron Pair* “plain language” standard when construing section 405(h), it ignored that standard when it addressed the statutory instructions contained in section 2664. Instead, the *Healthback* decision inexplicably relied upon dicta in an Arizona state court of appeals medical malpractice decision¹³⁰ to read a “substance/procedure” distinction into the statutory language of section 2664, thereby finding section 2664 inapplicable to the correction to section 205 set out by Congress in section 2663.

3. Mandamus Claims “Arising Under” the Medicare Act

Diversity and bankruptcy jurisdiction were contained in section 24 of the Judiciary Act. As a result, the courts in *Bodimetric* and *St. Mary’s* had little difficulty in determining Congressional intent as to section 205(h). Mandamus jurisdiction,¹³¹ however, was not covered by the original version of section 205(h) because it was not included in section 24 of the Judiciary Act. Although the Supreme Court has repeatedly declined to decide whether mandamus jurisdiction is available for claims arising under the Social Security and Medicare Acts,¹³² several circuit courts have determined that mandamus jurisdiction is not barred by section 405(h).¹³³

130. See *Allen v. Fisher*, 574 P.2d 1314 (Ariz. Ct. App. 1978) (Statutory provisions that require medical malpractice actions to be referred to review panel could not be applied retroactively to medical malpractice action initiated prior to effective date of statute).

131. See 28 U.S.C. § 1361 (1994).

132. See, e.g., *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 457 n.3 (1999); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 698 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 332 n.12 (1976); *Norton v. Mathews*, 427 U.S. 524, 528-33 (1976).

133. See, e.g., *Burnett v. Bowen*, 830 F.2d 731, 737-38 (7th Cir. 1987); *Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984); *Belles v. Schweiker*, 720 F.2d 509, 512

For example, the Second Circuit, in *Ellis v. Blum*,¹³⁴ noted that mandamus jurisdiction, although extended to all district courts until 1962,¹³⁵ had been exercised by the District of Columbia courts long before the codification of section 405(h) in 1939.¹³⁶ And although the power to exercise that jurisdiction had been recognized as an appropriate basis for challenging agency decisions long before the enactment of section 405(h), it was not included in section 405(h)'s jurisdictional bar.¹³⁷ Thus the court concluded:

It would seem plausible to conclude from this that when Congress enacted section 405(h) in 1939, it did not bar the District of Columbia courts from issuing writs of mandamus against the Secretary's predecessor, and that when the power to issue such writs was decentralized in 1962, it did not then suddenly become subject to section 405(h)'s stricture.¹³⁸

This interpretation is not, however, universally accepted. For example, one district court found mandamus jurisdiction barred by section 405(h) based on the mandamus statute and its relationship to the other general grants of jurisdiction of the district courts. In *Total Renal Laboratories, Inc. v. Shalala*,¹³⁹ the court determined that Congress' placement of the mandamus jurisdiction among the grants of general jurisdiction contained in Title 28 had the effect of incorporating it into section 405(h), since as originally enacted, it contained within its bar all the general grants of jurisdiction.

CONCLUSION

In *Illinois Council*, the Supreme Court clarified the breadth of the "arising under" language of the Medicare Act's administrative channeling provision: "[I]t is the action arising under the

(8th Cir.1983); *Ellis v. Blum*, 643 F.2d 68, 77 (2d Cir. 1981); *Ryan v. Shea*, 525 F.2d 268, 272 (10th Cir. 1975).

134. See 643 F.2d 68 (2d Cir. 1981).

135. See *id.* at 81. This jurisdiction, derived from the Act of February 27, 1801, 2 Stat. 103 (1801), provided that the laws of Maryland should continue in force in that part of the District of Columbia which had formerly been Maryland. *Id.* at 81 (citing *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) and *Clark Byse & Joseph V. Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 310-12 (1967)).

136. See *Ellis*, 643 F.2d at 81.

137. See *id.*

138. *Id.*; accord *Ganem v. Heckler*, 746 F.2d 844, 851 (D.C. Cir. 1984).

139. 60 F. Supp. 2d 1323, 1330 (N.D. Ga. 1999).

Medicare Act that must be channeled through the agency.”¹⁴⁰ It does not matter that the claimant frames its claim as constitutional, procedural or substantive. If the substance and standing for the claim is the Medicare Act, then the claimant must go through the agency’s administrative channeling provisions first, even if “intertwined,” ancillary claims are also raised in the same action. While the Court’s decision effectively eliminates the federal question and federal defendant jurisdictional statutes absent exhaustion of administrative remedies, compelling arguments exist for the proposition that the jurisdictional bar set out in sections 205(g) and 205(h) of the Social Security Act actually applies to a much wider set of jurisdictional statutes, thus leaving a dissatisfied and administratively unexhausted Medicare provider with little, if any, opportunity for judicial review absent a “final” administrative determination.¹⁴¹ While the effect of the *Illinois Council* decision on the lower courts remains to be seen,¹⁴² it is likely that there will also be significantly more judicial attention paid to the widely unrecognized but congressionally-mandated jurisdictional bar in amended section 205(h), especially in the bankruptcy arena, where an increasing number of Medicare providers and suppliers are bringing their disputes with the Secretary.¹⁴³

140. *Illinois Council*, 120 S.Ct. at 1099.

141. We recognize that ours is not the only view on these issues. One writer has argued that “[v]irtually since the inception of the Medicare program in 1966,” the Secretary [of Health and Human Services] has “staunchly opposed” efforts by beneficiaries and providers “to obtain timely, meaningful responses to important questions concerning implementation of the Medicare statute,” “apparently by taking the position that the federal courts are without jurisdiction to entertain any claims ‘arising under’ the Medicare statute” except as set forth in the Medicare statute’s appeal provisions. This writer further asserts that “[t]he courts have generally accepted the Secretary’s position, albeit without particularly coherent or insightful analysis.” Timothy Blanchard, “Medicare Medical Necessity Determinations Revisited: Abuse of Discretion and Abuse of Process in the War Against Medicare Fraud and Abuse,” 43 *St. Louis L.J.* 91, 104 (1999).

142. See, e.g., *Visiting Nurses Ass’n of Southern Indiana, Inc., v. Shalala*, 213 F.3d 352 (7th Cir. 2000); *American Soc’y of Anesthesiologists v. Shalala*, 90 F. Supp. 2d 973 (N.D. Ill. 2000); *American Soc’y of Cataract and Refractive Surgery v. Shalala*, 94 F. Supp. 2d 914 (N.D. Ill. 2000); *Homecare Ass’n for America, Inc., v. U.S. Dep’t of Health & Human Servs.*, No. 98-6364, 2000 WL 1289154 (10th Cir. Sept. 13, 2000); *Cathedral Rock of North Coll. Hill, Inc. v. Shalala*, 223 F.3d 354 (6th Cir. 2000); *Association of Am. Med. Colls. v. United States*, 217 F.3d 770 (9th Cir. 2000); *Frontier Health Inc. v. Shalala*, 2000 WL 1335483 (E.D. Tenn. Aug. 10, 2000); *American Chiropractic Ass’n v. Shalala*, 108 F. Supp. 2d 1 (D.D.C. 2000).

143. Some practitioners suggest that bankruptcy may be an appropriate forum for Medicare providers to resolve Medicare-related disputes and dispose of their Medicare-related liabilities and assets. See, e.g., Sarah Robinson Borders & Rebecca Cole Moore, *Purchasing Medicare Provider Agreements in Bankruptcy*, 24 *CAL. BANKR.*

J.X (1998); Paul R. DeMuro & Esther R. Scherb, *Steering Around Successor Liability in Health Care Transactions*, 1129 PLI Corp. L. & Prac. 23 (1999); Samuel R. Maizel & Judith A. Waltz, *Keeping Medicare and Medicaid at Bay: Bankruptcy and Healthcare Entities*, Paper presented at the *American Health Lawyers Associations's Institute on Medicare and Medicaid Payment Issues* (Mar. 29-31, 2000).